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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1250

STANDARD OIL COMPANY,
Appellant,

vs.

ROBERT G. SHARPE, MOTOR VEHICLE COMPTROLLER, STATE OF MISSISSIPPI,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

RESPONSE OF APPELLANT TO MOTION TO DISMISS OR AFFIRM

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TABLE OF AUTHORITIES

CASES

Braniff Airways v. *Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 74 S. Ct. 757 (1954) 4

Heisler v. *Thomas Colliery Co.*, 260 U.S. 245, 43 S. Ct. 83 (1922) 5

New York, ex rel. Bryant v. *Zimmerman*, 278 U.S. 63, 49 S. Ct. 61 (1928) 5

Street v. *New York*, 394 U.S. 576, 89 S. Ct. 1354 (1969) 5

The Great Atlantic & Pacific Tea Company, Inc. v. *Cottrell, Health Officer, State of Mississippi*, 96 S. Ct. 923 (1976) 6

CONSTITUTIONAL PROVISION

Fourteenth Amendment, Constitution of the United States 3, 4, 5

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Appellee does not even attempt to respond on the merits of appellant's Constitutional claims, but is content to quote from the opinion of the state court and follow this with the ipse dixit that the state court "correctly rejected" appellant's Constitutional claims and that appellant's contrary contentions are "patently frivolous". There is no way to respond to this except to say simply that it isn't so.

The argument that appellant's customers may have used some of the fuel in vehicles instead of as a heating agent is outside of the Constitutional issue, because the tax is not challenged except as applied to No. 2 oil which was

in fact used as a heating agent in manufacturing asphalt, and there is no question at all but that the fuel in vast quantities was so used.

At most, appellee points to the testimony of Everard Green Baker, Jr. as supplying testimony on which the rank discrimination can be justified. Anticipating this, the transcript of this man's testimony was included in full in the Appendix to the Jurisdictional Statement. (Apx. A56, et seq.) This witness simply claims nothing factually which could possibly justify the destructive discrimination so apparent from the face of the tax statutes, which doubles the price of one fuel and omits any tax on the competitive fuel.

As against these vague argumentative assertions, it is to be noted as significant that appellee does not assume to attack the basic truisms on which appellant's Constitutional claims are founded.

Appellee does not challenge the fact that the imposition of the tax would completely destroy the business of selling No. 2 oil for use as an industrial heating agent or the fact that the tax, once understood as being imposed by law, could never produce revenue or be of any fiscal significance to the state, because no one could afford to use it. Also unchallenged is the fact that No. 2 oil would, because of the tax, be entirely withdrawn from the flow of commerce and eliminated as a significant contribution to the production of vital industrial energy.

Discrimination is not denied, as indeed it could not be, nor is any effort made to bring the admitted discrimination within the range of reason or common sense, thereby leaving its arbitrariness exposed clearly to view.

Appellee challenges appellant's right to invoke the Commerce Clause of the Constitution and this Court's jurisdiction to consider it. It is argued that the Commerce Clause was not specifically mentioned in the state courts.[1] Cases cited are to the effect that this Court has no jurisdiction to reverse on Constitutional issues not raised in some fashion in the state courts. We respond briefly to this argument.

At the outset, it is to be emphasized that we point to the Commerce Clause as an add-on to emphasize that the federal interest in this case extends even beyond the Constitutional Due Process and Equal Protection accorded persons under the Fourteenth Amendment. The primary Constitutional violation remains firmly anchored to the Fourteenth Amendment, but the confiscatory tax, made so by invidious discrimination, deserves special attention when the result is nationalized by an interruption of the flow of commerce in the sale and use of a commodity which is as vital to industrial progress as heating fuel, especially in times such as the present.

The tax statute was distinctly challenged on the ground that it was repugnant to the Constitution of the United States. The reasons assigned, in summary, were (1) the tax would double the cost of the fuel, while closely competitive fuels were left untaxed, thereby totally destroying appellant's business of selling No. 2 oil for use as a heating agent; (2) the discrimination had no logical nexus with a state interest; (3) the tax, by reason of being priced out of use with tax added, was self-destructive and was not sustainable as a true revenue measure; and (4) the result was to destroy commerce in this area for want of the ability to sell the fuel in the market place.

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1. Standard Oil Company was the appellee in the State Supreme Court and, therefore, no specification of errors was required or appropriate, since Standard was seeking affirmance of the lower court,—not reversal.

Therefore, while the Fourteenth Amendment is the starting point, the discrimination's effect upon interstate commerce has always been prominent in Constitutional challenge. This is so because the invidious discrimination, contrary to the Fourteenth Amendment, is the obvious and inescapable cause of the burden imposed upon commerce. In short, violation of the Commerce Clause follows, as a matter of course, in the wake of the discrimination involved and fans the fire set by the Fourteenth Amendment's violation in this case and adds still another area of federal concern with the one-sided tax treatment accorded appellant by the challenged statute.

The fact that the state court singled out the Fourteenth Amendment for express mention is not the controlling point on the jurisdictional question raised by the motion of appellee. The Fourteenth Amendment challenge is alone enough to confer jurisdiction and the Court may consider related Constitutional mandates which fall within the clear intendment of the explicitly articulated challenge.

In *Braniff Airways* v. *Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 74 S. Ct. 757 (1954), the appellant relied explicitly upon the Commerce Clause in its challenge of a tax statute but on appeal turned its attention and argument to the Due Process Clause of the Fourteenth Amendment, which had not been explicitly spelled out before, but this Court held that the Constitutional challenge, though inexplicit, was sufficient to invoke the Court's jurisdiction to consider all points, saying on this point:

> "The argument upon which appellant depends ultimately, however, is that its aircraft never 'attained a taxable situs within Nebraska' from which it argues that the Nebraska tax imposes a burden on interstate

commerce. In relying upon the Commerce Clause on this issue and in not specifically claiming protection under the Due Process Clause of the Fourteenth Amendment, appellant names the wrong constitutional clause to support its position. While the question of whether a commodity en route to market is sufficiently settled in a state for purpose of subjection to a property tax has been determined by this Court as a Commerce Clause question, the bare question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is one of due process. However, appellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented. See People of State of New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67, 49 S. Ct. 61, 63, 73 L. Ed. 184, and cases cited; Wolfson and Kurland, Jurisdiction of the Supreme Court of the United States, 149 et seq." (74 S. Ct. at p. 762).

See also *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 49 S. Ct. 61 (1928), and *Street* v. *New York*, 394 U.S. 576, 89 S. Ct. 1354, 1361 (1969).

In passing, it is noted that the Commerce Clause was discussed, though not raised in the state court, in the case of *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245, 43 S. Ct. 83 (1922), and this is the case cited and most relied upon by the state court in the case at bar.

We continue reliance on the Due Process and Equal Protection mandates of the Fourteenth Amendment, the

violation of which has not only imposed an unconstitutional burden upon appellant in the operation of an important segment of its lawful business, but an unconstitutional burden upon commerce as well, all being undue and unreasonable burdens imposed without any counterbalancing benefits accruing to the State of Mississippi except as such may relate to a one-time-around penalty accidentally incurred as in the instance now before the Court, from which the state would become unjustly enriched[2] to the assessed extent of $198,543.26. Cf. *The Great Atlantic & Pacific Tea Company, Inc.* v. *Cottrell, Health Officer, State of Mississippi*, 96 S. Ct. 923 (1976). In like manner, the burden imposed on commerce by the tax here in question is clearly excessive in relation to the putative local benefits, which in the present case are demonstrably non-existent.

CONCLUSION

It is respectfully submitted that substantial and serious Federal Constitutional claims are presented which heretofore have not been resolved by this Court in the context of the facts here presented and that the Court should review the case in depth on this appeal and reverse the de-

2. This is especially evident in this case, because the proof shows, without dispute or conflict, that appellant's customer (Mid-State Paving Company) used the price of the fuel *without* the tax added in submitting its bid on the paving work for the state for which the fuel was used in manufacturing asphalt paving material, the result being that the state would collect twice,—once by reason of the reduced contract price and again when the tax is collected, compounded by the exaction of arbitrary penalties.

cision of the Supreme Court of Mississippi on Constitutional grounds.

Respectfully submitted,

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